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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs.

ELVA JEAN ANDERSON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE
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IN THE

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-vs-

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NOW COMES ELVA JEAN ANDERSON, RESPONDENT in the above captioned cause, by her attorneys, the State Appellate Defender Office, by Kim Robert Fawcett, and requests this Honorable Court to grant leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Michigan Supreme Court (without pre-payment of costs) and to proceed in forma pauperis pursuant to Rule 46. The Respondent's affidavit in support of this motion is attached hereto.

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: Kim Robert Fawcett
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226

Dated: December 3, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

I, ELVA JEAN ANDERSON, being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forum pauperis, without being required to prepay costs or fees:

1. I am the Respondent in the above captioned cause; I am a citizen of the United State of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently employed. I was last employed by the Chrysler Company in 1975, before my trial. I do not recall my wages.

B. I have not been employed since 1975; I have received no income in the past twelve months from any business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources. I support myself by welfare checks.

C. I do not own any cash or checking or savings account.

D. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

E. I have one minor daughter who is dependent on me for her support

4. I believe that I am entitled to the benefit of the judgment of the United States Supreme Court.

5. I have been found indigent for purposes of: (1) trial in the Detroit Recorder's Court, appeal (2) to the Michigan Court of Appeals, and (3) to the Michigan Supreme Court. On all appeals to date I have been represented by the State Appellate Defender Office, by Kim Robert Fawcett, 1200 Sixth Avenue, Third Floor-North Tower, Detroit, Michigan 48226.

Further, I say not.

Elva J. Anderson
ELVA JEAN ANDERSON

Subscribed and sworn to before me
this 26th day of November, 1980.

Luther A. Bennett

Notary Public, Wayne County, Michigan
My commission expires:

LUTHER A. BENNETT
Notary Public, Wayne County, Mich.
My Commission Expires Feb. 7, 1982

IN THE

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OCTOBER TERM 1980

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STATE OF MICHIGAN,

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ON PETITION FOR A WRIT OF CERTIORARI
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STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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December 3, 1980

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Elva Jean Anderson respectfully requests this Honorable Court to deny the petition for writ of certiorari, seeking review of the opinion issued August 28, 1980 by the Michigan Supreme Court in People v Elva Jean Anderson, 409 Mich 474; 295 NW2d 482 (1980).

OPINIONS BELOW

Respondent accepts as correct the opinion contained in Petitioner's appendices "A", "B", and "C".

COUNTERSTATEMENT OF QUESTIONS PRESENTED

DID THE MICHIGAN SUPREME COURT CORRECTLY HOLD THAT RESPONDENT HAD BEEN ACQUITTED OF MURDER BECAUSE THE TRIAL JUDGE'S ACCEPTANCE OF A MID-JURY TRIAL GUILTY PLEA TO MANSLAUGHTER AND DISMISSAL OF THE ORIGINAL MURDER CHARGE REPRESENTED A RESOLUTION OF SOME OR ALL OF THE FACTUAL ELEMENTS OF MURDER?

DID THE FINDING OF A FACTUAL BASIS FOR THE GUILTY PLEA TO MANSLAUGHTER AND NOT MURDER, THE ACCEPTANCE OF THE PLEA AND THE IMPOSITION OF SENTENCE THEREON COLLATERALLY ESTOP ANY RETRIAL ON THE MURDER CHARGE?

COUNTERSTATEMENT OF FACTS

Respondent Elva Jean Anderson stands convicted of manslaughter, MCL 750.321; MSA 28.533, by her October 9, 1975 mid-jury trial plea of guilty. (Petitioner's Appendix E, p. 29). On November 24, 1975 the Respondent received a sentence of three years probation. (Respondent Appendix B, p. 1c).

On May 22, 1975 Respondent shot and killed a man who had attempted to rape her homosexual lover. (Petitioner's Appendix, C, pp. 22-23; E, pp. 28-30). The testimony at the preliminary examination is summarized in the opinion below, People v Anderson, 409 Mich 474, 479-480 295 NW2d 482, 484-485 (1980), which summary hereby is incorporated by reference. The Respondent was originally charged with first degree (premeditated and deliberated) murder. MCL 750.316; MSA 28.548. A pretrial motion to quash the single count information was denied by the Honorable Thomas Poindexter, the trial judge, who was not the examination Magistrate. (Petitioner's Appendix C, p . 22-23).

Trial by jury began on October 7, 1975. On the 7th and 8th of October, 1975, the prosecution presented five witnesses. (Respondent's Appendix A, p. 1a.) On October 9, 1975, at about 9:30 a.m. and before any witnesses were heard, the Court entertained a motion for reduction of bond. Defense counsel requested Respondent's release on personal bond and the prosecution objected on the ground that personal bond was not appropriate in a first degree murder case. However, Judge Poindexter asserted that he felt the court had been 'misled' at the beginning of the case and that he thought the proofs were strong and had denied the motion to quash on that basis but now he thought the proofs were not strong. The judge said, additionally, that if, at the start of the case he had had before him all the information he now had, he would have granted personal bond. Thereupon Judge Poindexter did grant Respondent's release on personal bond. After counsel approached the bench for an off-record conversation Respondent offered to plead guilty to manslaughter. (Petitioner's Appendix C, pp. 24-27.)

Respondent pled guilty to manslaughter immediately thereafter, over prosecution objection. (Petitioner's Appendix E.)

Judge Poindexter advised Respondent that she could continue the trial although he did not specify on what charge trial might continue:

> "THE COURT: You also understand that if you wanted you could complete the trial which has been going on in this case -- a jury has been impanelled, witnesses sworn and testimony taken -- you could continue with the jury trial or it is possible that, if you so moved, the Court might decide to waive the jury and try the case without a jury; do you understand that?
>
> DEFENDANT ANDERSON: Yes, I do."
> (Petitioner's Appendix E, p. 36.)

Subsequently, the Court stated:

> "THE COURT: You understand, however, that by offering a guilty plea in this case you -- to the charge of manslaughter -- with regard to that charge you are giving up your right to trial either by jury or by the Court?
>
> DEFENDANT ANDERSON: Yes." (Emphasis supplied). (Petitioner's Appendix E, pp. 31-32.)

After examining Respondent regarding the necessary factual basis for the guilty plea, Judge Poindexter accepted the plea of guilty to manslaughter and dismissed the charge of first degree murder and the lesser included offense of second degree murder (Petitioner's Appendix E, p. 38).

The prosecution did not concur in the acceptance of the plea or the dismissal of the murder charges (Petitioner's Appendix E, p. 39).

Judge Poindexter made the following finding for the record:

> "The Court would find in this case, after hearing the testimony up to this time, that the charge of murder should not have been made in this case; that the Judge who conducted the examination in this case, if she had heard the testimony that has been given in this Court, would not have bound the defendant over on the charge of murder in the first degree and that this Court, prior to the trial of the case, when considering a motion made by the defense to dismiss the case, would have dismissed the charges of murder in the first degree and murder in the second degree if the Court had been in possession of the facts which this Court has heard in this case." (Petitioner's Appendix E, p. 39). (Emphasis supplied).

Judge Poindexter then continued to make findings of fact and law in further explanation for his acceptance of the guilty plea to manslaughter and his dismissal of first and second degree murder (Petitioner's Appendix E, pp. 39-50). Judge Poindexter stated in support of his actions that he found Respondent did not use reasonable force to justify the homicide but went beyond reasonable force and committed manslaughter:

> "The defendant in this case does not qualify under any of the other exceptions establishing justification or excuse as an exception to the crime, but she was, in this instance, entitled to rely on the facts as they appeared to her at the time of the events that constituted the homicide. In this case the res gestae witnesses in the case gave testimony that the defendant was called by Barbara Golden and told that the deceased was attempting to rape her and that he was remaining outside and that he had a gun.
>
> In determining whether the defendant was justified under these circumstances the matter must be determined from the standpoint of the defendant in the case, not from the standpoint of the officers -- the officer in charge of the case, nor from the standpoint of the Prosecutor, nor the Judge, but from her own honest intentions in a matter of this kind, and the Court feels that there was -- under these definitions, if the defendant had only used reasonable force in the case she would have been justified under the circumstances of this case.
>
> The reason that this Court has accepted the plea of manslaughter in the case is the fact that the Court concludes that she did not limit herself to reasonable force in this case but that she went beyond reasonable force in the case and, therefore, committed the offense of manslaughter in this case, which is the crime as, for instance, where a policeman, in making an arrest uses excessive force and commits a homicide -- the crime is manslaughter and the same rule would apply to a citizen as in this case and, accordingly, this Court dismisses the -- the Court grants Mr. Roth's motion filed prior to the trial of this case, to dismiss to the extent that it applies to the charges of murder in the first degree and murder in the second degree, leaving the charge of manslaughter, to which the defendant has just pled guilty in this case." (Petitioner's Appendix E, pp. 43-45). (Emphasis supplied).

* * *

"THE COURT: The Court is not granting a mistrial in the case. The Court would have felt in this case, in the interests of justice, at some stage of the proceedings that it was necessary to direct a verdict of not guilty as to the charges of murder in the first and second degrees; however, in view of the plea that was offered in the case the Court is merely granting a previous motion made by the defense to dismiss the charges and which the court feels now it should have done previously or at the time it was first heard." (Petitioner's Appendix E, pp. 44-45). (Emphasis supplied).

The prosecution claimed that it still had two witnesses to call and one would testify regarding Respondent's intent to kill and that a *prima facie* case of first degree murder had been established (Petitioner's Appendix E, pp. 45-46). The Court responded as follows:

"THE COURT: The Court having heard the testimony in this case --

MR. MOURADIAN: May I have a minute, your Honor?

THE COURT: Yes -- I am going to answer part of what you said -- the Court concluded that the People simply had not overcome their burden of proving that there was no excuse or provocation as to murder in the first and second degree and, accordingly, the Court would have had to eventually direct a verdict of not guilty on those two counts.

MR. MOURADIAN: That's without hearing all the evidence in the case.

THE COURT: I granted the motion made prior to the commencement of the trial in this case.

You are overlooking the fact that the law -- it is clearly established that in determining matters of this kind it must be looked at from the belief and position of the defendant, not the beliefs or position of the officers in the case or any other person, and that the Court, having heard witnesses called by the People in the case, was convinced that she was well justified in believing that there was an attempted rape in the case." (Petitioner's Appendix E, pp. 46-47).

The prosecution asserted its intention to appeal and to retry Respondent on the original charge of first degree murder:

"MR. THOMPSON: Your Honor, may I address the Court in this matter?

THE COURT: Yes, will you state your name for the record and position in the matter?

MR. THOMPSON: Yes, your Honor. John Thompson, Assistant Prosecuting Attorney.

Your Honor, I have just come from downstairs to this courtroom and I haven't heard any of the trial in this case but it is my understanding and I would appreciate the Court correcting me if I am wrong, but it is my understanding that the Court is now in the middle of a jury trial and has taken a plea to manslaughter over the Prosecution's objection?

THE COURT: Over the Prosecution's objection and despite the decision of the Supreme Court in the case of Prosecutor versus Circuit Court Judge of Genesee County. The Court believes it is not acting contrary to that." (Petitioner's Appendix E, p. 47). (Emphasis supplied).

Respondent expressly refused to waive the Double Jeopardy Clause's bar to retrial.

"MR. THOMPSON: Do we understand, your Honor, by proffering this plea, and by the Court accepting it, that the defense would waive any question of jeopardy that may arise in the substantive case?

MR. ROTH: No." (Petitioner's Appendix E, p. 48).

Finally, Judge Poindexter stated his rulings and actions were taken based upon the merits of the case:

"I have done what I think is proper in this case. In the beginning there was a plea offered; the Prosecutor's Office did not approve of the plea at that time, and at that time I felt that, based on the testimony taken at the examination, that the Prosecution was justified in taking the matter to trial without any reduced plea. I may say that, having heard the testimony in the case of the res gestae witnesses thus far, the Court is satisfied that the Court was in error in denying the motion previously. I am satisfied that if the Examining Magistrate had heard the testimony that has been heard in this court that the defendant would not have been bound over for trial on the charge of first degree murder in this case." (Petitioner's Appendix E, pp. 48-49). (Emphasis supplied).

On October 9, 1975, the jury was discharged. Petitioner appealed to the Michigan Court of Appeals.

On August 9, 1977 the Michigan Court of Appeals issued an opinion

reversing the trial court and ordering retrial on first degree murder, notwithstanding Respondent's Motion to Dismiss for lack of jurisdiction on grounds of double jeopardy. People v Anderson, 77 Mich App 357; 258 NW2d 225 (1977). Respondent appealed to the Michigan Supreme Court which reversed, in the opinion below, People v Anderson, 409 Mich 474; 295 NW2d 482 (1980), holding:

> "The trial judge's action represented a resolution of 'some or all of the factual elements' of the murder charge and was therefore an acquittal for double jeopardy purposes, barring reprosecution. It is irrelevant that the acquittal
> a) was not so denominated by the trial judge,
> b) may have been erroneous both procedurally and in terms of the questions of law on which it was founded, and
> c) came about with defendant's cooperation and consent." Anderson supra, 479; 295 NW2d 484.

Petitioner seeks review of the opinion below by writ of certiorari, which Respondent opposes.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION: WAS RESPONDENT TRULY ACQUITTED?

It is important to emphasize that there was an express reason for dismissing the murder charges and it was an evidentiary reason, i.e., the lack of any evidence to support the elements of malice (second-degree murder) or premeditation and deliberation (first-degree murder). Having heard virtually the whole case, if not technically all of it, the trial judge determined that there was sufficient evidence to support only the crime of manslaughter and not murder in either degree (Petitioner's Appendix E, pp. 43-45). The Judge determined that he could not submit the murder charges to the jury and said as much when he explained that he would eventually have had to direct a verdict of acquittal on first and second degree murder (Petitioner's Appendix E, pp. 44-45; 46-47).

It is true that the trial court did not hear the whole of the prosecution's case. The trial judge did, however, hear virtually

the whole case, less only two res gestae witnesses and various police witnesses. Unlike the ordinary case, in which testimony favorable to the prosecution's side comes in first and then, only after the prosecution rests does testimony favorable to the defense come in, in the case at bar evidence favoring the defense came out in the prosecution's case-in-chief. By the end of the second day of trial the trial judge determined that there was no reasonable inference that could be drawn from the evidence other than that a manslaughter, not murder, had occurred.

It is hardly important that the prosecution had one more witness left who could testify to an intent to kill (Petitioner's Appendix E, pp. 45-46). The trial judge had already heard testimony establishing an intent to kill; the one remaining res gestae witness who could testify on that point must be deemed cumulative, at best.

In short, given everything testified to by the prosecution's witnesses, the only permissible inference was that Respondent did not use reasonable force under the circumstances and, therefore, the killing was not a justifiable homicide but a manslaughter.

The Michigan Supreme Court concluded as follows:

> "We conclude that the judge's decision to accept Anderson's mid-trial plea and to dismiss the murder charge involved a resolution of factual elements of the offense charged, and was based on his belief, correct or incorrect, prematurely formed or not, that the evidence was insufficient to support a conviction of murder." People v Anderson, supra, 487; 295 NW2d 488.

Petitioner argues, as reasons why the writ should issue, that the Michigan Supreme Court was "understandably confused" by recent decisions of this Honorable Court relating to acquittals under the Double Jeopardy Clause; that lower courts in general face a "dilemma" in applying the rules of decision and that those rules are "contradictory and conflicting". Further, Petitioner addresses the merits of the opinion below and argues that the trial judge

really rested his dismissal of murder on a purely legal ground and failed to reach the ultimate question of guilt or innocence. Petitioner argues that the present record, although complex, presents a unique opportunity for this Honorable Court to bring clarity to a confused situation (Petition for Writ of Certiorari, pp. 5-6). Was the Michigan Supreme Court confused? Respondent answers it was not.

2. THE MICHIGAN SUPREME COURT DEMONSTRATED NO CONFUSION IN RECOGNIZING AND APPLYING THE CONTROLLING RULES OF DOUBLE JEOPARDY LAW.

If the unanimous Michigan Supreme Court was confused it did not say so. If anything, the opinion below, authored by Justice Charles Levin, is clear; there is a total absence of textual evidence for the claimed confusion.

The opinion below readily identifies the controlling principles upon which the Michigan Supreme Court relied. That Court referred to the fundamental rule that a judgment of acquittal is not reviewable. United States v Martin Linen Supply Co., 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977); United States v Scott, 437 US 82; 97-98 S Ct 2187; 57 L Ed 2d 65 (1978). See People v Anderson, supra, 483 note 10 and accompanying text; 295 NW2d 486. The opinion below further identifies the rule that a trial judge's characterization of his own action is not controlling on a reviewing court. United States v Scott, supra 96; United States v Jorn, 400 US 470; 91 S Ct 547; 27 L Ed 2d 543 (1971). See People v Anderson, supra, 486 and accompanying notes 24-27; 295 NW2d 487. The Michigan Supreme Court recognized that to be an acquittal a dismissal must be fact-based. United States v Scott, supra, pp. 97-98; Burks v United States, 437 US 1, 10; 98 S Ct 2141; 57 L Ed 2d 1 (1978). See People v Anderson supra, 491; 295 NW2d 490. Finally, the opinion below recognized the rule that an acquittal is an acquittal even if it results from erroneous evidentiary rulings or erroneous interpretations of governing law. United States v Scott, supra p. 98; Sanabria v United States, 437 US 54-64; 98 S Ct 2170; 57 L Ed 2d 43 (1977); Fong Foo v United States, 369 US 141, 143;

82 S Ct 671; 7 L Ed 2d 629 (1962). See People v Anderson, supra, 492-493 and accompanying notes 33-36; 295 NW2d 490-491.

It can hardly be said that the Michigan Supreme Court failed to properly identify the law it was supposed to apply. Since the controlling rules were properly identified, the only question for review is the correctness or incorrectness of the application of those rules. Ross v Moffet, 417 US 600, 616-617; 94 S Ct 2437; 41 L Ed 2d 341, 354 (1974). Respondent will show that the Michigan Supreme Court correctly held that the dismissal of murder in the case at bar was a fact-based acquittal in the true sense and that there was no fundamental misapplication of the rules. But first, one may ask whether other court's are confused or face a dilemma in applying the fact-based acquittal rule? If so, does the case at bar raise a substantial federal question?

3. THE CASE AT BAR DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION. LOWER COURTS DEMONSTRATE NO CONFUSION IN APPLYING THE FACT-BASED ACQUITTAL RULE.

The case at bar raises no substantial federal question. There is no showing, or even claim, by Petitioner that a conflict exists between the opinion below and any opinion by a federal court of appeals or highest state court of review. There is also no support shown by Petitioner for the claim that lower courts actually face a dilemma in applying the fact-based acquittal rule. The majority of this Court in United States v Scott, supra, 98 note 11, discounted the spectre of possible confusion by courts in distinguishing between those rulings which relate to the ultimate question of guilt or innocence and these which serve other purposes. Still, Petitioner hypothesizes such difficulty, fails to support the claim, and argues that it is urgent for this Court to review once again, in a unique case, an area just recently addressed.

The fact-based acquittal rule is not even three years old. When the Michigan Court of Appeals issued its opinion in this case United States v Scott, supra, had not been decided. Since Scott only a handful of applications of the rule have been passed upon by the Michigan Court of Appeals. See People v Smith, 89 Mich App 478; 280 NW2d 862 (1979) (On reh); People v Greer, 91 Mich App 18; 282 NW2d 819 (1979); People v Jakiel, 92 Mich App 754; 285 NW2d 448 (1979); People v Killarney, 95 Mich App 396; 290 NW2d 156 (1970). The present case is the first opportunity that the Michigan Supreme Court has had to reach the issue. But see People v Hampton, 407 Mich 354, 385-386; 285 NW2d 284 (1979) certiorari den. ___US___; ___S Ct ___; ___ L Ed 2d ___; 28 CrL 4006, October 8, 1980. There has been insufficient time since Scott for the lower courts to work with the fact-based acquittal rule so as to justify review by this Court. A sound empirical basis has not been shown to exist demonstrating any need for this Honorable Court to speak now to the application of the fact-based acquittal rule.

Although by no means exhaustive, a review of lower courts in select cases demonstrates the workability of the Scott rule. See: United States v Moore, 613 F2d 1029 (US DC 1979) certiorari den. ___US___; 100 S Ct 2922; ___L Ed 2d (1980)(no bar to Government appeal under Scott from bench trial dismissal - legal defense); United States v Allied Towing Corp, 602 F2d 612 (CA 4 1979)(no bar to Government appeal under Scott - jurisdictional defense); United States v McInnis, 601 F2d 1319 (CA 5 1979) certiorari den. ___US___; 100 S Ct 1649; 94 L Ed 2d 237 (1980)(no bar to Government appeal under Scott - legal ground for dismissal); United States v Gonzales et al, 617 F2d 1358 (CA 9 1980) certiorari den. sub. nom. Patel v United States ___US___; __ S Ct___; ___L Ed 2d ___ (No. 80-117; October 15, 1980) 49 LW3265, 3270; 28 CrL 4033-4034 October 15, 1980; People v Dennis Waggoner, 196 Colo 578; 595 P2d 217 (1979); Commonwealth v Wimberly, ___ Pa ___; 411 A2d 1193 (1980); State v

Rhinehart, 21 Wash App 708; 586 P2d 124 (1978) rev. on other grounds 92 Wash 2d 923; 602 P2d 1188 (1979) (five justices agreed on Scott's applicability - majority did not reach issue). Although the Scott case was misread in State ex rel Dowdy v Robinson, 257 SE2d 167 (W. Va) (1979), the subsequent decision in State ex rel Betts v Scott, 267 SE2d 173 (W. Va) (1980) corrected the error.

If the foregoing sample of cases demonstrate anything it is that the lower courts can and are working with the fact-based acquittal rule and that no confusion or dilemma is sufficiently evident to justify review by this Court at this time.

The lower courts sit for the very purpose of applying the rules of decision announced by this Honorable Court. Time and experience with the fact-based acquittal rule will afford the best test of the rule after hundreds of unique factual situations occur. Although uniformity of rule application is a desireable goal, absent any showing of actual conflicts or special difficulty with the rule, there is no need for the Court to accept review in every case that comes along. For this reason alone this Honorable Court should deny review in this case. But there is another reason. The instant case arose, sui generis, and carries no national significance.

4. THE PRESENT CASE AROSE IN AND IS TOO ROOTED TO PROCEDURAL RULES PECULIAR TO MICHIGAN AND THEREFORE LACKS NATIONAL SIGNIFICANCE.

As noted by the Michigan Supreme Court in its opinion below, the case at bar arose in the context of developing state procedural law. People v Anderson, supra, 409 Mich 481-482; 295 NW2d 485. See Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 115; 215 NW2d 693 (1972)(Genesee I); Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974). (Genesee II).

In Genesee I the Michgan Supreme Court reversed a trial judge who had reduced an information by pretrial amendment so as to charge a lesser offense and then permitted the defendant to plead

guilty to the reduced charge, over the prosecution's objections. In reversing, the Genesee I opinion reserved for a later day the question whether the trial judge could have properly reduced the information if it had determined that defendant was not guilty of the higher original charge:

> "In addition, because of the trial judge's determination that [defendant] McBride was 'actually guilty of the higher offense' we are not concerned with any question of the scope of authorized power under MCLA 767.76; MSA 28.1016 to amend informations for technical defects or because of variance with the evidence." Supra, 682-683. (Emphasis supplied).

Although the circumstances differ, the case at bar raised the issue reserved in Genesee I, supra, namely does a trial judge have the power, the judicial power, to reduce an original charge to a lesser offense and accept a guilty plea thereto when the trial judge determined that the defendant cannot be properly found guilty under the higher charge?

The trial judge in the case at bar said that he would eventually have had to direct a verdict of not guilty at the conclusion of Petitioner's proofs because he believed that, as a matter of law, only a manslaughter, not murder had been committed (Petitioner's Appendix E, pp. 45, 46-47). By so stating, the trial judge disclosed his assumption that two state procedures existed whereby he could pass on the sufficiency of the evidence. The first option, GCR 1963, 515.1, was to grant a motion for a directed verdict as to the murder charge. This option the judge believed was available to him at the close of the prosecution's case. The second option was to dismiss the murder charge under an exception to Genesee I, supra, where it appeared to him that Respondent could not be proved guilty beyond a reasonable doubt of murder. The judge believed that either option was available because the evidence at trial was insufficient as a matter of law (Petitioner's Appendix E, p. 47). The trial judge perceived that

whatever additional evidence could be shown on the question of intent to kill, that proofs would still be insufficient to establish any crime greater than manslaughter. People v Anderson, supra, 490-491; 295 NW2d 489. By equating his actions with a directed verdict of not guilty (Petitioner's Appendix E, p. 45, 46-47), the trial judge demonstrated that he was reaching the ultimate question of guilt or innocence. His equation of the two belies that he was merely revisiting a pure question of law. The judge simply chose what he perceived as one of two then available state procedures for determining Respondent not guilty of murder in any degree. He was not relating the trial testimony back to review the pretrial motion to quash, without regard to the ultimate question of guilt or innocence.

More to the point, the procedural context in which the case at bar arose has no significance outside of Michigan and it will not occur in Michigan again. By its opinion below the Michigan Supreme Court has expressed that a directed verdict at the close of the prosecution's case is the only option available to a trial judge who believes a criminal defendant is not guilty due to evidentiary insufficiency. People v Anderson, supra, 481-482; 493-494; 295 NW2d 485, 491. Since the procedural context in the present case cannot recur in Michigan there is little point in this Honorable Court addressing the issue,. Nor is there likely to be many such cases outside of Michigan. In short, there is no national significance to the ruling below. For these reasons, this Honorable Court should deny review. Moreover, on the merits, the opinion below is correctly decided.

5. THE MICHIGAN SUPREME COURT CORRECTLY RULED ON THE MERITS AND DID NOT FUNDAMENTALLY MISAPPLY THE RULES OF DECISION ANNOUNCED BY THIS COURT.

Petitioner argues that the trial judge used the trial testimony to "relate back" to this pretrial motion to quash. Thus, according to Petitioner, the trial judge never reached the ultimate issue of guilt or innocence. This argument is specious.

The Michigan Supreme Court rejected the premise of the relation back theory. People v Anderson, supra, 485-486; 295 NW2d 487. At its core Petitioner's argument gives an uncritical emphasis to the form of the trial judge's action, not its meaning. It is true that the trial judge said he was granting the pretrial motion to quash. But the purpose of such motion is to test the exercise of discretion by the examining magistrate. The standard is whether an abuse of discretion occurred based upon the four corners of the examination transcript. People v Doss, 406 Mich 90, 101; 276 NW2d 9 (1979); Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115, 121; 215 NW2d 145 (Genesee II). Amplifying testimony at trial is not considered. People v Paille #2, 383 Mich 621, 626; 178 NW2d 465 (1970); People v Charles D. Walker, 385 Mich 565, 572; 189 NW2d 234 (1971). If an abuse of discretion is found reprosecution is possible; the case does not terminate. People v Miklovich, 375 Mich 536; 134 NW2d 720 (1965); People v Panknin, 4 Mich App 19; 143 NW2d 806 (1966).

Clearly the trial judge did not contemplate further prosecution; he did not remand the case for further examination. The purpose of the judge's actions was to finally terminate the prosecution. Twice the trial judge said the testimony at examination was sufficient to hold Respondent for trial (Petitioner's Appendices C, p. 22 and E, p. 49). No abuse of magisterial discretion was found. Rather the judge merely opined that if the magistrate had heard the trial testimony, as opposed to that heard at examination, Respondent would not have been held for trial on the first degree murder. The Michigan Supreme Court properly

viewed the judge's characterization of his own action as an "afterthought" to Petitioner's objections. People v Anderson, supra, 487; 295 NW2d 488. The dismissal went to both first and second degree murder, whereas the motion to quash addressed only the original charge. The judge evaluated the evidence at trial and concluded that it was insufficient. The judge evaluated the defense of justification or excuse and concluded that Petitioner could not overcome its burden of proving the absence of justification or excuse. Therefore, he concluded that a manslaughter and not a murder had occurred. Whatever the correctness of the judge's legal interpretation, see People v Doss, supra, 98-99; and People v Van Wyck, 402 Mich 266, 269; 262 NW2d 638 (1978), he obviously did reach the ultimate question of guilt or innocence. It is not the function of preliminary examination for defenses to be evaluated. People v Weiden, 239 Mich 169; 214 NW 120 (1925); People v Medley, 339 Mich 486; 64 NW2d 708 (1954).

If Petitioner's theory stands then the label a trial judge affixes to his own actions will have talismanic significance. Serfass v United States, 420 US 337, 392; 95 S Ct 1055; 43 L Ed 2d 265 (1975). Such characterization by a trial judge would be controlling on the constitutional question, contra to United States v Scott, 96 and cases cited therien. The Michigan Supreme Court properly rejected this kind of mechanical formulae. People v Anderson, supra, 486; 295 NW2d 487. If Petitioner were correct, a trial judge could simply label any dismissal, fact-based or not, as an acquittal and bar further review.

In conclusion, several factors support the conclusion that the trial judge reached the ultimate question of guilt or innocence and acquitted Respondent of murder in any degree: the judge (a) convicted Respondent of manslaughter; (b) sentenced Respondent for manslaughter stating: "The Court heard testimony in the case and

came to its own conclusion regarding the facts of the case (Respondent's Appendix B, p. 1b); (c) evaluated the evidence at trial regarding the defense of justification or excuse and asserted the evidence was insufficient as a matter of law because the prosecution had not and could not carry its burden to overcome the defense regardless of further evidence showing an intent to kill; (d) ruled that Respondent did not limit herself to reasonable force; (e) found Respondent was well justified in her belief that there was an attempt at rape; (f) denied he was granting a mistrial, thus implying he did not contemplate reprosecution; (g) did not find an abuse of discretion by the magistrate; (h) found the examination testimony sufficient; (i) did not remand the case for further examination; (j) believed he was empowered to accept a guilty plea if he would eventually have had to direct a verdict of not guilty; and (k) acted in good faith:

> "[Y]...I am satisfied that what I have done is correct both factually, legally and from a justice standpoint ..." (Petitioner's Appendix E, p. 49).

Whether the judge was correct or not in his legal interpretations which led to his dismissal is irrelevant. United States v Scott, supra, 98. Petitioner's "real quarrel is with the judgment of acquittal". Sanabria v United States, supra, 77.

Nor did Respondent waive the protection of the Double Jeopardy Clause (Petitioner's Appendix E, p. 48). Respondent's cooperation is irrelevant. As this Honorable Court said in Sanabria, supra, 78:

> "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mistrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests [citation omitted], and would vitiate one of the fundamental rights established by the Fifth Amendment.

> The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo v United States, makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances."

For all of the above reasons, the Michigan Supreme Court did not fundamentally misapply Double Jeopardy law. The writ should not issue.

6. THE FINDING OF A FACTUAL BASIS FOR THE GUILTY PLEA TO MANSLAUGHTER AND NOT MURDER, THE ACCEPTANCE OF THE PLEA AND THE IMPOSITION OF SENTENCE THEREON COLLATERALLY ESTOP ANY RETRIAL ON MURDER.

Regardless of whether the trial judge acquitted Respondent on the first and second degree murder charges there exists an independent reason why the Double Jeopardy Clause bars retrial on any charges arising from the May 22, 1975 shooting incident. The doctrine of collateral estoppel bars retrial under the circumstances of the instant case. Ashe v Swenson, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970); People v Grey, 393 Mich 1, 222 NW2d 515 (1974).

The principle of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future prosecution. Ashe v Swenson, supra, 397 US 443.

A. THE TRIAL JUDGE'S ACCEPTANCE OF THE PLEA AND IMPOSITION OF SENTENCE IS A FINAL JUDGMENT.

Since Petitioner filed a claim of appeal in the instant case it must be deemed to admit that the trial judge's action constitutes a final judgment. A final judgment is a prerequisite for a prosecutor appeal. People v Blachura, 390 Mich 326; 212 NW2d 182 (1973). But see Jackson Prosecutor v Court of Appeals, 394 Mich 527; 232 NW2d 172 (1975) (stating only that final pretrial order

provides jurisdiction). Respondent agrees that the judge's action is a final judgment. Jeopardy attaches when a defendant who pleads guilty is sentenced. People v Alvin Johnson, 396 Mich 424, 431 note 3; 240 NW2d 729 (1976); citing People v Burt, 29 Mich App 275, 277; 185 NW2d 207 (1970). Respondent was sentenced on her plea of guilty to manslaughter on November 24, 1975.

B. THE QUESTION OF FACT WHETHER DEFENDANT USED REASONABLE FORCE WAS A QUESTION OF ULTIMATE FACT IN THIS MURDER A PROSECUTION AND THE TRIAL JUDGE FOUND AS A MATTER OF FACT THAT RESPONDENT WENT BEYOND THE USE OF REASONABLE FORCE.

There is little doubt that regardless of the trial judge's treatment of the murder charges he found that Defendant did not use reasonable force to render the homicide justifiable but that she went beyond reasonable force and committed manslaughter (Petitioner's Appendix E, p. 44).

In accepting a plea of guilty a trial judge must make a finding that a factual basis exists for the plea; i.e., that the defendant is in fact guilty of the offense to which he or she is pleading, GCR 1963, 785.7(3)(a) as amended November 7, 1975, previously, GCR 1963, 785.7(3)(c) and 785.7(3)(d).

When a trial judge accepts a plea of guilty in the middle of trial he may rely upon the testimony adduced at trial in the course of making his finding of fact compliant with the factual basis requirements of the court rules. People v Armstrong 390 Mich 693, 698-699; 213 NW2d 190 (1973).

A trial judge always has the power to accept a plea of guilty. GCR 1963, 785.7. People v Matulonis, 60 Mich App 143, 148; 230 NW2d 147 (1975); Genesee II, supra, 119.

The question of the validity of the plea of guilty is distinct from the question whether the plea bars Petitioner from further trial of the murder charges. It is the latter course that

the Petitioner seeks and it is only insofar as the plea of guilty prohibits further trial on murder that the Petitioner objects to it. (This is so because, presumably, the Petitioner would not object to the fact that Respondent has pleaded guilty to manslaughter so long as she still must stand trial on the first degree murder charge.) See People v Auer, 393 Mich 667, 671-672, 679-681; 227 NW2d 528 (1974); People v Ringstaff, 53 Mich App 223, 225, 226; 218 NW2d 859 (1979), rev'd on other grounds, 393 Mich 263; 224 NW2d 287 (1974), aff'd on reh. 64 Mich App 639, 644; 236 NW2d 728 (1975).

The information charged Respondent with first and second degree murder and manslaughter and the trial judge found that there was a factual basis showing manslaughter, based upon his hearing of the trial testimony, and accepted a plea of manslaughter. Thereafter he sentenced her on that offense.

Any retrial would involve the same parties and the same facts that led to the trial judge's determination that reasonable force was not used and so a manslaughter was committed. Therefore, any retrial of Respondent would be in direct contradiction of the collateral estoppel doctrine. Ashe v Swenson, supra.

Although the Michigan Supreme Court did not reach this point the result below would be the same if it had so ruled. The Court may therefore consider the argument. United States v New York Telephone Co., 434 US 159, 155 note 8; 98 S Ct 364; 54 L Ed 2d 376 (1977). Citing Langes v Green, 282 US 531, 538-539; 51 S Ct 243; 75 L Ed 520 (1931); Dandridge v Williams, 397 US 471, 475 note G; 90 S Ct 1153; 25 L Ed 2d 491 (1970).

This Honorable Court need not review the case at bar for the reason that the collateral estoppel ground would be an independent alternative ground supporting the result below. The writ should be denied.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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BY: _____

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Dated: December 3, 1980

RESPONDENT'S APPENDIX

APPENDIX A

Trial Record, Detroit Recorder's Court

Jurors previously impanelled and sworn return to Court to hear further testimony in said cause:

Oct 7, 1975: Opening statements by both parties.
People's witnesses: Carrie Burton, sworn by Louise B. Darmis, Court Clerk; Satish Shah, sworn by Louise B. Darmis, Court Clerk; Willie Young, sworn by Louise B. Darmis, Court Clerk.

Oct 8, 1975: Willie Young, heretofore sworn by Louise B. Darmis, Court Clerk; Viola Wheeler, sworn by the Court;
Barbara Golden, sworn by the Court.

Oct 9, 1975: During the process of the jury trial, defendant pleads guilty. Jury panel is excused.

Hon. Thomas L. Poindexter
Recorder's Court Judge

APPENDIX B

Sentence Transcript

SENTENCING TRANSCRIPT

State of Michigan
In the Recorder's Court of the City of Detroit
(People of the State of Michigan vs Elva Jean Anderson)
(Docket No. 75-3831)

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the Honorable Thomas L. Poindexter, one of the Judges of the Recorder's Court of the City of Detroit, on Monday, November 24th, 1975.

APPEARANCES: Brian MacKenzie, Assistant Prosecuting Attorney, on behalf of the People;

Benjamin Roth, Attorney at Law, on behalf of Defendant Anderson.

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(2)

Detroit, Michigan. Monday, November 24th, 1975.

THE COURT: This is Case No. 75-03831, People vs. Elva Jean Anderson.

MR. ROTH: We are ready to proceed to sentence, your Honor.

THE COURT: Defendant Anderson, you were charged with murder in the first degree and, on October 9th, 2975(sic), you pled -- this Court dismissed -- discontinued the trial of the case, which was in progress at that time, and accepted a guilty plea to manslaughter in the case which, under Section 750.321 of the Compiled Laws, is a felony and carries a maximum punishment of 15 years imprisonment.

Is there anything you wish to say before sentence is pronounced?

DEFENDANT ANDERSON: I don't think so.

MR. ROTH: I have read the report, but I don't understand one paragraph -- the last paragraph -- I tried to get an interpretation from Mr. Mader but he wasn't prepared to do so, so I am still

(3)

at a loss with that last report -- that last paragraph.

I think your Honor is fully familiar with the facts and circumstances in this case --

THE COURT: Yes, I have heard the testimony --

MR. ROTH: -- so I don't have to --

THE COURT: The Court is cognizant of the fact that this may not be a final disposition of the case --

MR. ROTH: That's true.

THE COURT: -- in view of the fact that I understand the Prosecutor intends to attempt to review this Court's actions in dismissing the murder charge in the case. I understand that a transcript of the trial proceedings has been ordered.

This Court gave a great deal of attention to this case and, in the first instance, the Court was somewhat misled by statements that were made by police officers and prosecutors regarding the nature of the case.

This Court heard the testimony in the case and came to it's own conclusion regarding the

(4)

facts of the case.

Tell me this, Ms. Anderson, you said you have an eight year old daughter. What are your connections with the daughter at this time?

DEFENDANT ANDERSON: My sister have her.

THE COURT: How is she supported?

DEFENDANT ANDERSON: She's on Aid right now.

THE COURT: Do you support her, your daughter?

DEFENDANT ANDERSON: Yes, I do.

THE COURT: What would happen if you were required to serve some time -- what would that do to your job prospects?

DEFENDANT ANDERSON: Well, I might not have the possibility of getting my job back.

THE COURT: You have been locked up since the beginning of this case?

MR. ROTH: That's right, until your Honor released her on October 9th.

THE COURT: That was how many days?

MR. ROTH: On May 22nd, I noticed

(5)

on the information, your Honor, up until October 9th.

COURT CLERK: 135 days.

THE COURT: Well, there is a recommendation that you should be placed on probation and to serve some time in jail on the sentence -- I don't now (sic) what the purpose of that would be, since you have already had to serve 135 days in jail.

The Court will place you on probation for a period of three years.

You will be required to pay court costs in the amount of $350.00 at the rate of 20 dollars a month, beginning -- when you find employment.

You will be required to begin supporting your daughter by contributing at least 20 dollars a week to her support as soon as you are employed.

Finally, I am not in a position to tell anybody how to live their life, but in view of the fact that you did kill a person I am going to require that for at least one year you shall attend a church of your choice.

Defendant, the Clerk will hand

(6)

you a copy of your appeal rights.

If you desire to appeal you must appeal within 60 days from this date, and I understand the Prosecutor's Office also is considering an appeal in the case.

(Hearing of the Foregoing matter was concluded.)

# # # #

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 80-747

STATE OF MICHIGAN,

Petitioner,

-vs-

ELVA JEAN ANDERSON,

Respondent.

STATEMENT AS TO MAILING

I, JAMES R. NEUHARD, Defender, of the State Appellate Defender Office hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited at the United States Post Office, General Post Office, 1401 Fort Street, Detroit, MI, on Wednesday, December 3, 1980, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court, and that first class postage was prepared.

The papers so mailed were:

a) Motion to Proceed in Forma Pauperis
b) Affidavit in Support of Motion to Proceed in Forma Pauperis
c) Brief in Opposition to Petition for Writ of Certiorari
d) Appendix to c), supra
e) Proof of Service

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: _____
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226

Dated: December 3, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-747

STATE OF MICHIGAN,

Petitioner,

vs

ELVA JEAN ANDERSON,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

Dora Enloe being first duly sworn deposes and says that on December 3, 1980 she mailed the following documents:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing
Proof of Service

to: WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Counsel of Record
Principal Attorney, Appeals

BY: ANNE B. WETHERHOLT
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226

Further, deponent says not.

Dora Enloe

Subscribed and sworn to before me
this 3rd day of December, 1980.

VIRGINIA M. MELOSKY, Notary Public
Wayne County, Michigan
My commission expires: 2/28/83